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No. 81-97

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

A. O. SMITH CORPORATION,

Petitioner,

v.

DARREL C. NOTTELSON,

Respondent,

and

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Intervenor-
Respondent.

SUPPLEMENTAL APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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July 31, 1981

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APPENDIX B

Opinions of the United States District Court for the Eastern District of Wisconsin

Nottelson v. A. O. Smith Corporation and Smith Steel Workers

Memorandum and Order dated Dec. 7, 1979
481 F.Supp. 756 (E.D.Wis 1979)
Memorandum and Order dated April 18, 1980
489 F.Supp. 94 (E.D.Wis 1980)
Judgment entered on April 18, 1980
Memorandum and Order dated Sept. 18, 1980

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

DARREL C. NOTTELSON,

Plaintiff,

vs. Case No. 75-C-220

A. O. SMITH CORPORATION,
a foreign corporation, and
SMITH STEEL WORKERS DIRECTLY
AFFILIATED LOCAL UNION 190806,
AFL-CIO,

Defendants.

MEMORANDUM AND ORDER

This is a civil action brought by plaintiff under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2. Plaintiff, a Seventh Day Adventist, alleges that defendants discriminated against him on the basis of his religion by discharging plaintiff for his refusal to join or contribute to defendant union. The following constitutes the

findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure.

A court trial was held and the following facts developed. Plaintiff was employed by defendant company in 1947, and remained so employed until his discharge on July 11, 1975. For at least thirty years prior to plaintiff's discharge, defendant employer had been party to labor agreements with defendant union. Each agreement contained a union security clause which required all employees to join the union and pay dues as a condition of employment.

Plaintiff became a member of the Seventh Day Adventist Church in May 1966. The sincerity of his religious beliefs is not questioned. A basic tenet of this religion provides that its members not join or financially support labor unions and similar organizations, although each

member may personally decide whether to follow the tenet. In December, 1974, plaintiff notified the defendants that his religious beliefs prevented him from complying with the labor agreement's security clause. Plaintiff offered to contribute an amount equal to his union dues to a non-religious charity if defendants would attempt to accommodate his religious beliefs. As a good faith gesture, plaintiff made contributions of this amount to the American Cancer Society.

Defendants refused to accept plaintiff's offer as contrary to the union's constitution and bylaws. Defendant union, in a letter written on May 7, 1975, offered to remove plaintiff's name from its membership listings, but insisted that plaintiff continue to pay an amount equal to the dues to defendant union "for services both past and presently being rendered." Plaintiff rejected this offer

because his religious beliefs prevented him from financially supporting a union. Plaintiff was discharged on July 11, 1975. After plaintiff exhausted his administrative remedies, this Court took jurisdiction of his cause of action.

Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer -
> (1) to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . .

42 U.S.C. §2000e-2(c)(3) also makes it an unlawful employment practice for a union to "cause an employer to discriminate against an individual in violation of this section." In determining whether discrimination has occurred on the basis of an individual's religion, 42 U.S.C. §2000e(j) defines religion as including:

> all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.

The language of section 2000e(j) clearly applies to all types of religious observances and practices. "[T]he definition is what may be termed as an operative one: all forms and aspects of religion, however, eccentric, are protected except those that cannot be, in practice and with honest effort, reconciled with a business-like operation." Cooper v. General Dynamics, 533 F.2d 163, 168, cert. denied, 433 U.S. 908 (5th Cir. 1976); see McDaniels v. Essex International, Inc., 571 F.2d 338 (6th Cir. 1978). Thus, plaintiff's sincerely held religious beliefs fall within section 2000e(j) and defendants are subject to the statute's proscription against discrimination.

To establish a prima facie case of discrimination under 42 U.S.C. §2000e2(a), plaintiff must establish that: 1) he had a bona fide belief that union membership and the payment of dues are contrary to his religious faith as a Seventh Day Adventist; 2) he informed defendants employer and union of his views and that they were in conflict with the union security agreement; and 3) he was discharged from his employment due to his refusal to join defendant union and pay the required amount of dues. Yott v. North American Rockwell Corp., No. 78-1790 (9th Cir., Aug. 21, 1979); Burns v. Southern Pacific Transportation Company, 589 F.2d 403, 405 (9th Cir. 1978); Anderson v. General Dynamics Convair, 589 F.2d 397, 401 (9th Cir. 1978).

The evidence presented at trial shows that plaintiff satisfied his burden of establishing a prima facie case against

defendants. Plaintiff, a Seventh Day Adventist, held a sincere belief in December 1974, in accordance with the tenets of his religion, opposing membership in and contributions to unions and similar organizations. The evidence also indicates that plaintiff, in December 1974, notified defendants that such belief prevented him from complying with the labor agreement's security clause requiring union membership and the payment of dues. He did, however, offer to contribute a sum equal to the amount of union dues to a non-religious charity. After many months of attempted conciliation between plaintiff and defendants, plaintiff was discharged by defendant employer on July 11, 1975 due to his refusal to comply with the security agreement.

Plaintiff was not required, in establishing a prima facie case, to

accommodate his own religious beliefs before seeking a compromise by defendants. "While . . . plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position this is part of plaintiff's burden of proof." Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1972). "We agree . . . that the employee who has provided his employer with sufficient information to put it on notice is not required, as part of his prima facie case, to show that he thereafter made some efforts either to compromise or accommodate his own religious beliefs before he can seek an accommodation from his employer." Anderson v. General Dynamics Convair, 589 F.2d at 401, fn.3. Thus plaintiff, by informing the defendants of his sincerely held belief, did all that he was required to do to

establish a prima facie case of discrimination in his discharge.

Once plaintiff has been shown to have established a prima facie case of employment discrimination, the burden then shifts to the defendants to "demonstrate that he is unable to reasonably accommodate . . [plaintiff's] religious observance or practice without undue hardship on the conduct of the employer's business." Redmond v. GAF Corp., 574 F.2d at 901; see McDaniel v. Essex International Inc., 571 F.2d at 343.

> The Supreme Court and the Court of Appeals have made it clear that an employer has an affirmative obligation under Title VII to attempt to accommodate the operations to his employee's religious beliefs. An employee may demonstrate that he has complied with his legal obligation by showing any additional accommodation would be an undue hardship. Padon v. White, 465 F. Supp. 602 607 (S.D. Tex. 1979); see Yott v. North American Rockwell Corp., supra; Anderson v. General Dynamics Convair, supra.

Thus, defendants must show that they made

a good faith effort to accommodate plaintiff's religious beliefs, and that any further accommodation would create an undue hardship within the meaning of the statute.

In determining whether defendants have satisfied their burden, this Court recognizes that the existence of the union security agreement, requiring union membership and the payment of dues, does not automatically establish a lack of accommodation by defendants. The passage of Title VII in no way:

> precludes or trenches in any direct way upon an employer's making a union security agreement. He and his union can make any agreement they like and enforce it in the general run of cases - in all except the unusual one where compliance would run counter to a particular employee's religious conviction, sincerely held, that can be accommodated without undue hardship. Cooper v. General Dynamics, 533 F.2d at 170.

Thus, the thirty-year old security agreement between defendant employer and

defendant union does not in itself lessen the effects of defendants' attempts to accommodate plaintiff's religious beliefs. The agreement may not, however, lead to employment discrimination in its implementation.

Defendant union contends that section 2000e(j) is limited to employers and imposes no legal duty upon defendant union to make reasonable accommodation to plaintiff's religious beliefs. While section 2000e(j), which establishes the need for accommodation, specifically refers only to employers, defendant's contention is without merit. Title VII clearly imposes the same duty not to discriminate on a union as well as an employer. Yott v. North American Rockwell Corp., supra. As such, the ability of defendant union to accommodate to plaintiff's religious beliefs, and the effect such accommodation would have on defendant union may be considered:

> In enacting [§2000e(j)] Congress explicitly required a balancing between the religious needs of the individual and the legitimate business needs of an employer. By implication the same balancing applies to the needs of a union, at least where a claim of discrimination arises from the enforcement of the terms of a collective bargaining agreement. McDaniel v. Essex International, Inc., 571 F.2d at 344.

Proceeding to an analysis of defendants' attempts at accommodation, 42 U.S.C. §2000e(j) and section 2000e-2(a) require defendant employer and defendant union to make reasonable accommodation for the religious observances of its employees short of incurring an undue hardship. While the statute is unclear as to the extent of accommodation required, the legislative history clearly shows that "Congress intended to require some form of accommodation." Trans World Airlines v. Hardison, 432 U.S. 63, 74 fn.9 (1971). The extent to which defendants have attempted a reasonable accommodation, and

to which further accommodation would be an undue hardship must be analyzed according to the particular facts presented, since "the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case." Anderson v. General Dynamics Convair, 589 F.2d at 400.

In the present case, defendants rejected plaintiff's offer to donate the amount of union dues to a non-religious charity in return for a waiver of the defendant's security clause. Defendants offered, however, to keep plaintiff's name off of the union membership roll, but insisted that plaintiff contribute an amount equal to defendant union's dues to defendant union, for services past and presently being rendered. Plaintiff rejected this offer as contrary to the tenets of the Seventh Day Adventist Church. Where, as here, the effort made

by defendants to accommodate plaintiff's religious belief is viewed as inadequate by plaintiff, the question becomes whether the further accommodation that plaintiff has requested constitutes undue hardship. Yott v. North American Rockwell Corp., supra.

This Court finds that the accommodation suggested by plaintiff, whereby plaintiff would contribute an amount equal to union dues to a non-religious charity, does not constitute undue hardship within the meaning of 42 U.S.C. §2000e(j). The cost of an accommodation or its impact on workers must be greater than de minimus for undue hardship to be demonstrated. Trans World Airlines v. Hardison, supra; Yott v. North American Rockwell Corp., supra; Padon v. White, supra. Plaintiff's offer of accommodation would be only a de minimus cost to defendants. There is no evidence that many workers other than

plaintiff would seek a similar accommodation due to their religious beliefs. Indeed, defendant union would lose only ten dollars a month, certainly a minimal amount, by allowing this single worker to pay that figure to a non-religious charity. In addition, plaintiff was not attempting to accept the benefits offered by defendant union as a free rider. He offered to fulfill this responsibility by contributing an amount equal to the union dues to a normal charity. As such, the cost to defendants of accepting plaintiff's offer would have been only de minimus.

"Undue hardship means something greater than hardship . . . Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship." Anderson v. General Dynamics Convair, 589 F.2d at 402. "An employer or union would have to show .

. . actual imposition on co-workers or disruption of the work routine . . ." to establish undue hardship. Burns v. Southern Pacific Transportation Co., 589 F.2d at 401. Neither of these considerations are apparent in the present case. Allowing plaintiff to contribute the specified sum to a non-religious charity would not increase the amount or severity of duties required of his co-workers. Furthermore, no disruption of the work routine would occur because plaintiff would continue to perform all of his employment duties. Since there is no evidence that many other workers would seek similar accommodations, it is doubtful that substantial labor strife would be engendered from the acceptance of this one individual's offer of accommodation. Given the reasonableness of plaintiff's offer of accommodation and its de minimus cost, defendants have failed to

carry their burden of establishing that its acceptance would constitute an undue hardship within the meaning of the statute.

For the foregoing reasons, judgment must be rendered for plaintiff. Plaintiff is therefore instructed to draft a form of judgment and present it to this Court within two weeks after the issuance of this memorandum and order.

This Court also notes that plaintiff has requested that he be awarded attorney's fees. Because the award of attorney's fees under Title VII is within the Court's discretion and neither party has discussed the propriety of their issuance, this Court will require the parties to submit briefs on this issue. Such briefs must be presented to this Court within one month of the issuance of this memorandum and order.

SO ORDERED this 7th day of December, 1979, at Milwaukee, Wisconsin.

/S/ Robert W. Warren
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

DARREL C. NOTTELSON,

Plaintiff,

vs. Case No. 75-C-220

A. O. SMITH CORPORATION, a foreign corporation, and SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,

Defendants.

JUDGMENT

This action came on for trial before the Court, Honorable Robert W. Warren, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that by April 28, 1980, defendant A. O. Smith Corporation reinstate plaintiff to the position which he held at the time of his discharge as an employee of said defendant with all seniority rights and benefits and

at the rate of pay of not less than the rate of pay to which he would now be entitled if he had not been so terminated from his employment.

IT IS FURTHER ORDERED that defendants A. O. Smith Corporation and Smith Steelworkers Directly Affiliated Local Union 19806, AFL-CIO recompense plaintiff for the loss plaintiff has sustained thereon including lost wages and all other benefits for each and every week from plaintiff's discharge until such time as this Judgment shall have been complied with, together with interest thereon at the rate provided by law. This amount, however, shall be offset by any interim earnings and employment compensation received during the period from plaintiff Smith's discharge to the date of reinstatement. This shall be a joint liability of the aforesaid defendants. In the event the parties are not able to arrive at an

agreed upon amount for said loss within a reasonable time, either party may petition the Court for a determination of the amount for which the said defendants are liable to plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that defendant Union shall accommodate plaintiff's religious convictions that proscribe plaintiff to neither join nor financially support a labor union in the manner hereinafter set forth only.

IT IS FURTHER ORDERED AND ADJUDGED that in lieu of the payment of Union initiation fees, dues and fees uniformly assessed for agency service fees, plaintiff shall authorize defendant Employer to withhold from plaintiff's payroll checks and pay a sum, equivalent to the Union initiation fees and dues and uniformly assessed fees paid by those employees of A. O. Smith Corporation covered by a Collective Bargaining Agreement that may

from time to time be in effect between defendants, to a non-union, non-religious charitable organization mutually agreed upon by the plaintiff and defendant Smith Steelworkers D.A.L.U. 19806, AFL-CIO, and said defendant Employer shall obtain for the benefit of said Union a receipt from said charity evidencing to the Union this equivalent payment in lieu of union dues and fees unless otherwise agreed to by said parties. Plaintiff shall execute the necessary authorizations regarding his wages to defendant Company so that said payments to said charitable organization shall be automatically deducted from his paycheck.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall pay to a charity mutually agreed upon by plaintiff and the Union an amount equal to the union dues he would have owed had he not been discharged, i.e., covering the period from

the time he was discharged until the time he is reinstated.

IT IS FURTHER ORDERED AND ADJUDGED that defendant Company and defendant Union are hereby enjoined from any discrimination against plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall be awarded his costs in this action.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff is entitled to an award of attorney's fees as prayed for him in his complaint in an amount to be determined by the Court if the parties cannot reach an accommodation.

IT IS FURTHER ORDERED AND ADJUDGED that defendant Union be and hereby is enjoined from litigating this matter in any forum other than by appeal from this Court.

IT IS FURTHER ORDERED AND ADJUDGED

that this Court shall retain jurisdiction over this matter pending full compliance with the provisions of this judgment.

APPROVED: /S/ Robert W. Warren
UNITED STATES DISTRICT JUDGE

Dated at Milwaukee, Wisconsin, this 18th day of April, 1980.

RUTH W. LA FAVE
CLERK OF COURT

By: /S/ N. Budelman
Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

DARREL C. NOTTELSON,

Plaintiff,

vs. Case No. 75-C-220

A. O. SMITH CORPORATION, a foreign corporation, and SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,

Defendants.

MEMORANDUM AND ORDER

On December 7, 1979, this Court entered a memorandum and order resolving this action in plaintiff's favor. The memorandum and order constituted the Court's findings of fact and conclusions of law following a court trial on the merits of this case. Both defendants were found liable, but judgment has not been entered.

Defendants have filed briefs and motions raising several issues which they

feel were left unanswered. Both defendants have also moved for reconsideration. Plaintiff has moved for an award of attorney's fees. Finally, several points must be clarified.

There are five issues which will be resolved in this opinion. In his complaint plaintiff sought relief under 42 U.S.C. §2000e-2 (and the religious accommodation definition in 42 U.S.C. §2000(e)(j)) and directly under the United States Constitution. The Court found liability under the statute without considering plaintiff's constitutional claim. Defendants argue that the Court should rule on the latter ground for relief. The next issue raised by the defendants is their claim that 42 U.S.C. §2000e(j) is unconstitutional because it is in violation of the establishment clause of the first amendment. The third problem raised by defendants involves an

allocation of damages. The fourth issue involves plaintiff's request for attorney's fees. Defendants argue that since plaintiff was denied a request for a preliminary injunction, if attorney's fees are awarded to plaintiff he should not be granted fees for the hours spent pursuing the interim equitable relief. Finally, defendants have moved for reconsideration on the merits.

Looking first towards the merits the Court remains convinced that it ruled correctly in its December 7, 1979 memorandum and order. In Tooley v. Martin-Marietta Corp., 476 F. Supp. 1027 (D. Ore. 1979), the court was faced with resolving a fact situation almost identical to the one presented in this Court; i.e., a plaintiff who refused to join a union or financially support it, but would contribute an amount equal to the union dues to a non-religious charity. The court

held that plaintiff was entitled to relief because the defendants, union and company, had not proved that the payments of the $228.00 annual union dues to a charity would result in an undue hardship. This Court found the accommodation would impose only a de minimus hardship and as such does not cause defendants an "undue hardship" as defined in 42 U.S.C. §2000(e)(j). See, e.g., Yott v. North American Rockwell Corp., 602 F.2d 904 (9th Cir. 1979). At this time this Court would again state that on this basis defendants have not shown that the accommodation would cause an undue hardship. Consequently, defendants' motion for reconsideration on the merits is denied.

Defendants' motion for reconsideration also raises a question of statutory pre-emption. They argue that labor questions are governed by the National Labor Relations Act (NLRA) which

they assert preempts Title VII of the Civil Rights Act. Under 29 U.S.C. §158(a)(3), (b)(2) of the NLRA unions are authorized to negotiate and enforce contract provisions calling for shops which are closed to all but union members. In Tooley v. Martin-Marietta Corp., 476 F. Supp. at 1027, the Court held that Title VII is an exception to the NLRA. The preeminence of Title VII over the NLRA was explained definitively by the court in McDaniels v. Essex International, Inc., 571 F.2d 338, 343 (9th Cir. 1979) where it held:

> This court is aware of the national policy of promoting labor peace which is served by the union security provisions of Taft-Hartley. Since July 2, 1964, however, there has been no national policy of higher priority than the elimination of discrimination in employment practices. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 47, 94 S.Ct. 1011, 39 L.Ed. 2d 147 (1974). Section 701(j) of the 1964 Act requires more than reliance on Taft-Hartley. The union security

> provisions of Taft-Hartley do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees.

See also, Anderson v. General Dynamics, Convair Aerospace Division, 589 F.2d 397 (9th Cir. 1979); Cooper v. General Dynamics, Convair Aerospace Division, 533 F.2d 163 (5th Cir. 1976), cert. denied, sub nom., International Association of Machinists and Aerospace Workers v. Hopkins, 433 U.S. 908 (1977). This tribunal will follow the cases cited and must conclude that Title VII takes precedence over the NLRA in the present case.

In so ruling the Court takes note of defendants' reliance upon recent congressional efforts to amend the closed shop provisions of the NLRA to require religious accommodation to show that Title VII was not intended to preempt the NLRA. Such action by Congress shows nothing. While the passage of an amendment to the

NLRA may indicate that Title VII does not cover labor union closed shop agreements, it is equally plausible to assume that the actions of Congress are being undertaken to reconfirm its commitment to civil rights. The proposition that the proposed amendment to the NLRA is meant to clarify the preeminence of Title VII is confirmed by reading excerpts of the relevant floor debates. 126 Cong. Rec. H 763 (1980). Consequently, this Court must conclude that Title VII applies in the present case.

Turning now to defendants' request for a ruling on the constitutional claim raised in plaintiff's complaint, the Court would note that complete relief is available to plaintiff under Title VII of the Civil Rights Act. Consequently, a finding of liability or non-liability under the constitutional claim will aid

neither party at this stage of the litigation. Defendants argue that, in the event this Court is reversed on its findings under Title VII, judicial economy would favor having the constitutional claim resolved. Nothing will be gained by resolving this issue now since, if the appeal results in an affirmance, this Court need never reach plaintiff's constitutional claim. If anything, economy favors silence at this time. As a result, no resolution will be made of plaintiff's alternative ground for relief.

Although plaintiff's constitutional claim need not be reached, defendant's constitutional attack on 42 U.S.C. §2000e(j) must be considered. Several courts have ruled that section 2000(e)(j) is unconstitutional. Under 42 U.S.C. §§2000(e)-2(a) and (b)(c), it is unlawful for a union or an employer to discriminate against an employee on the basis of

religion. Section 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Defendants argue that section 2000e(j) conflicts with that portion of the First Amendment to the United States Constitution which provides: "Congress shall make no law respecting an establishment of religion . . ."

In several cases the constitutionality of section 2000e(j) has been questioned. Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), Celebrezze, J. Dissenting; Gavin v. People's Natural Gas Co., 464 F. Supp. 622 (W.D. Pa. 1979); Yott v. North American Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977), aff'd without the court reaching the constitutional issue, 602 F.2d 904 (9th Cir.

1979). Several courts have found the statute constitutional. Cummins v. Parker Seal Co., 516 F.2d 544 (9th Cir. 1975) aff'd 429 U.S. 65 (1976), judgment vacated on other grounds, 433 U.S. 903 (1977); Tooley v. Martin-Marietta Corp., 476 F. Supp. 1027 (D. Ore. 1979); Brown v. General Motors Corp., 20 F.E.P. Cases 88 (W.D. Mo. 1978), rev'd on other grounds, 601 F.2d 956 (8th Cir. 1979).

This Court is drawn to the conclusion that under the facts in the present case section 2000e(j) does not offend the first amendment. The test to be used in determining whether a statute offends the establishment clause was outlined by the Supreme Court in Committee for Public Education v. Nyquist, 413 U.S. 756, 773 (1973):

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid

> excessive government entanglement with religion.

This Court will follow the lead of the court in Tooley v. Martin-Marietta Corp., supra. Judge Solomon in his opinion held that section 2000e(j) is constitutional stating:

> It is a neutral provision with a satisfactory purpose--to prevent discrimination resulting from the unreasonable refusal to accommodate religious beliefs and practices. A reasonable accommodation will not favor plaintiffs or their religion because plaintiffs agree to contribute to charity an amount equal to union dues. A reasonable accommodation will not result in government entanglement with religion greater than that approved [by the Supreme Court in several cases] . . . the religious accommodation provision promotes the free exercise of religion without violating the Establishment Clause. 1/

The facts in the present case are almost identical to those in Tooley and as applied to those facts section 2000e(j) is constitutional.

The next issue to be determined is the appropriate allocation of damages.

Defendant Union claims that it should not be liable for backpay since defendant A. O. Smith was plaintiff's employer and Smith fired plaintiff, the Union did not. The Union further points out that the only steps it threatened to take if Smith did not fire plaintiff was to process a grievance to arbitration and to file an unfair labor practice with the National Labor Relations Board. Smith argues that it should not be liable for backpay since it was ready and willing to accommodate plaintiff's religious beliefs. Because the Union was adamamt it fired plaintiff even though it could have avoided the issue by promoting plaintiff to a position not covered by the Union contract.

In this Court's opinion, each defendant is culpable. The Union for being so adamant; the employer for refusing to keep plaintiff on as an employee. While undergoing grievance proceedings may have

cost Smith something, it could have lessened its exposure and the harm to plaintiff by not firing plaintiff. The prospects were not that dim. The Union, on the other hand, should have accommodated. They chose not to and must suffer the costs. The defendants are jointly liable for the damages plaintiff has suffered, and, barring agreement subsequent hereto, can anticipate the Court ordering each defendant to pay one-half of the residual backpay.

In determining those damages, three issues must be resolved. First, whether the backpay to be awarded to plaintiff should be reduced by unemployment compensation benefits received by plaintiff in the interim and earnings from other employment. Second, should plaintiff pay an amount equivalent to the union dues for the period in question to an acceptable non-religious charity. Finally, should

plaintiff receive attorneys' fees and to what extent.

By the wording of the appropriate section of Title VII itself, 42 U.S.C. §2000e-5(g), "Interim earnings or amounts earnable with reasonable diligence by the person . . . discriminated against shall operate to reduce the backpay otherwise allowable." Likewise, unemployment benefits should also be deducted from the backpay award. See Association Against Discrimination in Employment, Inc. v. Weeks, 454 F. Supp. 758 (D. Conn. 1978). The record indicates that Smith has not reinstated plaintiff. Consequently his damages are not determinable at this time. Defendant Smith should reinstate plaintiff no later than April 28, 1980. Thereafter, the parties should meet to settle the amount of backpay to which plaintiff is entitled. If this issue cannot be resolved amicably, the Court will, of course, hold

a hearing to resolve the amount of backpay owing.

It is the Court's considered opinion that plaintiff should contribute to a non-religious charity an amount equal to the union dues he would have owed had he continued to work at Smith during the relevant period. The non-religious charity must be one agreed upon by plaintiff and defendant and Union. In attempting to settle damages, the parties should keep this holding in mind.

Turning to the attorneys' fee question, 42 U.S.C. §2000e-5(k) provides:

> In any action or proceeding under this title [42 USCS §§2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

While the statute provides that an award of fees is discretionary, in all but the

most unusual circumstances the prevailing party should be awarded attorneys' fees. See Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Clanton v. Allied Chemical Corp., 416 F. Supp. 39 (E.D. Va. 1976). There are no unusual circumstances present in this case and plaintiff will be awarded reasonable attorneys' fees.

Defendants suggest that the amount awarded should exclude fees for hours expended in plaintiff's pursuit of a request for a preliminary injunction which was not granted. In Batiste v. Furnco Construction Corp., 503 F.2d 447, 451 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975), the court held "the amount of the award [of attorneys' fees] should be proportionate to the extent that the party has prevailed in the suit." Since plaintiff prevailed in this lawsuit on his claim for discrimination, the merits of cause of action are established. Never-

theless the circumstances of the preliminary injunction proceedings indicates that plaintiff should be denied attorneys' fees incurred in pursuing that relief. The motion was denied and the action dismissed because plaintiff had not exhausted his administrative remedies before seeking relief here. This Court found that such exhaustion is a jurisdictional prerequisite to a suit under 42 U.S.C. §2000e et. seq. See 42 U.S.C. §2000e-5(f)(1); Nottelson v. A. O. Smith Corp., 397 F. Supp. 928 (E.D. Wis. 1975). Defendants should not have to bear the burden of plaintiff's attorneys' fees expended in seeking relief to which he is not entitled. Consequently, an award of attorneys' fees will be appropriately reduced.

Although plaintiff is entitled to attorneys' fees, the Court is not in a position to award a specific amount. As

with backpay both defendants are equally liable for the fees. In order to alleviate further unnecessary hearings, the parties should attempt to resolve this issue by agreement. If they cannot, of course, the Court will have to resolve this issue. Absent an agreement, plaintiff should file a motion supported by affidavit requesting an award of a specific amount of attorneys' fees by May 15, 1980. Defendants have until May 30, 1980 to file a response. If necessary, a hearing will be held.

In resolving the pending issues, the Court notes that the defendant Union intends to litigate a grievance before the NLRB if Smith is reinstated. The Union claims that if plaintiff returns to his position with Smith, Smith will be in violation of its collective bargaining agreement with the Union. To permit the Union to file a grievance with the NLRB

in light of this Court's ruling, would result in a fundamental unfairness. Therefore, at the parties' request the Union is hereby precluded and enjoined from litigating this matter in any forum other than by appeal.

One final issue that must be resolved involves the question "Was plaintiff's refusal to give the equivalent of dues to the Union based upon a secular aversion to strikes rather than on a religious belief?" (Issue 9 of the issues submitted upon stipulation). The answer to this is an unequivocal "no." Nothing more need be said on this point.

Finally, the Court would note that it is entering judgment concurrent with the entry of this order. Any additional relief can be granted pursuant to the judgment.

Therefore, it is hereby ordered that defendants' motion for reconsideration on

the merits must be and hereby is denied.

It is further ordered that defendants' attack on the constitutionality of 42 U.S.C. §2000-e(j) as applied in this case be and hereby is denied.

It is further ordered that defendants are jointly liable to plaintiff for backpay and attorneys' fees as more fully set forth in this opinion.

SO ORDERED this 18th day of April, 1980, at Milwaukee, Wisconsin.

/S/ Robert W. Warren
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

DARREL C. NOTTELSON,

Plaintiff,

vs. Case No. 75-C-220

A. O. SMITH CORPORATION,
a foreign corporation, and
SMITH STEEL WORKERS D.A.L.U.
19806, AFL-CIO,

Defendants.

MEMORANDUM AND ORDER

Three motions are currently before the Court in this matter. In the first motion, plaintiff, Darrel C. Nottelson, requests an award of attorney's fees. In the second motion, defendant Smith Steel Workers D.A.L.U. 19806, AFL-CIO ("Union"), asks the Court to stay those portions of its judgment of April 18, 1980 that would require the Union to pay any moneys to plaintiff prior to the resolution of this

case on appeal and that enjoin the Union from litigating this matter in any forum other than by appeal from this Court. In the third motion, defendant A. O. Smith also asks the Court to stay that portion of the judgment that would require it to pay any moneys to plaintiff until this matter is resolved on appeal. In its motion, Smith also requests the Court, in the event it grants the Union's motion to proceed before the N.L.R.B., to require the Union to post such security as this Court deems proper for the protection of Smith. These motions will be the subject of this memorandum and order.

In its memorandum and order of April 18, 1980, the Court held that plaintiff is entitled to attorney's fees and that both defendants are equally liable for the fees. The Court further ordered the parties to attempt to determine the specific amount by agreement. The parties

have failed to reach such an agreement and plaintiff has presented its accounting to the Court.

Both defendants now argue that the Court should reverse its earlier holding and not award any attorney's fees to plaintiff. They assert that this suit was used to advance the tenets of the Seventh-day Adventist Church as those tenets relate to the financial support of labor organizations. Defendants argue, in essence, that a court order requiring them to pay the legal fees of the Church, in its attempt to promote particular religious objectives, would violate the Establishment Clause of the Constitution.

The Court cannot accept defendants' argument. The decision of this Court was based on the finding that the plaintiff was discharged because of his religious beliefs. As the prevailing party, he was

awarded attorney's fees. What he intends to do with that money is his business. Furthermore, the Court sees no conflict arising under the Establishment Clause in awarding attorney's fees to a plaintiff who has been fired because he refuses to act in contradiction to his religious beliefs.

Defendants also contend that plaintiff's request for attorney's fees is excessive. Plaintiff's request for reasonable attorney's fees amounts to $19,734.30. This figure was based on a rate of $55.00 per hour charged in 1975; $60.00 per hour charged in 1976; $70.00 per hour charged in 1977; $75.00 per hour charged in 1978; and $85.00 per hour charged in 1979 and 1980. A total of 302.6 hours were spent in order to represent plaintiff's interests.

The Court has evaluated the request for fees in light of the criteria for

determining appropriate attorney's fees set forth in Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976). Based on its evaluation, the Court concludes that the amount of hours spent on this litigation was not excessive in light of the fact that this case was the first of its kind in the Eastern District of Wisconsin and the Seventh Circuit Court of Appeals and involved substantial pretrial discovery.

The Court does not believe, however, that the complexity of the case rises to such heights that it warrants a departure from the hourly figure for attorney's fees normally awarded by the Court. Accordingly, the Court will award plaintiff $50.00 per hour for the 37.4 hours it spent in connection with this case in 1978, 1979, and 1980 and $40.00 per hour for the 265.2 hours it spent in connection

with this case in 1975, 1976 and 1977. The total award to be paid by defendants is $12,478.00

Turning next to the Union's request that it be allowed to file charges against Smith with the N.L.R.B., the Court sees no valid reason for modifying its ruling of April 18 on this matter. The Court's concern that it would be unfair to allow the Union to file a grievance with the N.L.R.B., continues today. Accordingly, the Union's request to file charges with the N.L.R.B. must be and is hereby denied.

With respect to defendants' motion for a stay of any payments to plaintiff pending appeal, the Court notes that such stays are given as a matter of right under Rule 62(d) of the Federal Rules of Civil Procedure if the appealing party posts a bond in accordance with that rule. The amount of the bond to be posted is set by the trial court and usually is set in an

amount that will permit satisfaction of the judgment in full, together with costs, interest, and damages for delay.

In the case at hand, the parties have not yet reached an agreement as to what the amount of back pay should be. Therefore, the Court does not have before it a dollar figure which will cover the amount of the judgment.

Notwithstanding the lack of a judgment for a sum certain, the Court believes a stay would be appropriate if a supersedeas bond in the amount of $40,000.00 were posted. Accordingly, upon the filing of a supersedeas bond in the amount of $40,000.00 and upon the approval of that bond by the Clerk of Court for the Eastern District of Wisconsin, those portions of this Court's judgment of April 18, 1980 requiring defendants to pay any moneys to plaintiff will be stayed.

Finally, the Union's request that the

Court determine the validity of plaintiff's claim under Count II of the complaint must be denied since this Court now lacks jurisdiction to change its decision. Once a timely notice of appeal is filed, jurisdiction over all matters pertaining to the appeal passes to the court of appeals, and the district court is without authority to act further with regard to those matters, Elgin Manufacturing Corporation v. Vent Fabrics, Inc., 314 F.2d 440 (7th Cir. 1963).

In summary, plaintiff's motion for attorney's fees is granted for the amount indicated in this order. Defendants' motion to stay that portion of the judgment requiring them to pay amounts of money to the plaintiff will be stayed once their supersedeas bond has been posted and approved by the Clerk of Court, Eastern District of Wisconsin. Defendant Union's motion to stay to allow it to proceed before the N.L.R.B. is denied. Defendant

Union's request that the Court determine the validity of plaintiff's claim under Count II of the complaint is denied.

SO ORDERED this 18th day of September, 1980, at Milwaukee, Wisconsin.

/S/ Robert W. Warren
UNITED STATES DISTRICT JUDGE

APPENDIX E

Order of the United States Court of Appeals for the Seventh Circuit Denying Smith's Petition for Rehearing and Suggestion for Rehearing En Banc (April 20, 1981)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 20, 1981

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

DARREL C. NOTTELSON,
Plaintiff-Appellee
and EQUAL EMPLOYMENT OPPORTUNITY COM'N.
Intervenor-Appellee,
No. 80-1678, 80-1705
vs.
SMITH STEEL WORKERS D.A.L.U. 19806 and
A. O. SMITH CORPORATION
Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 75-C-220
Robert W. Warren, Judge

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing en banc filed in the above-entitled cause by defendants-appellants Smith Steel Workers and A. O. Smith Corporation and the responses thereto, a vote of the active

members of the Court was requested, and a majority* of the active members of the Court have not voted to grant a rehearing en banc. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED

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*Chief Judge Fairchild and Circuit Judges Pell, Wood and Bauer voted to grant the petition.